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Supreme Court, U.S.
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No. 98-126

In The

Supreme Court of the United States

October Term, 1997

THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF ILLINOIS,

Petitioner,

vs.

JANE DOE,

Respondent,

and

THE UNITED STATES,

Intervenor-Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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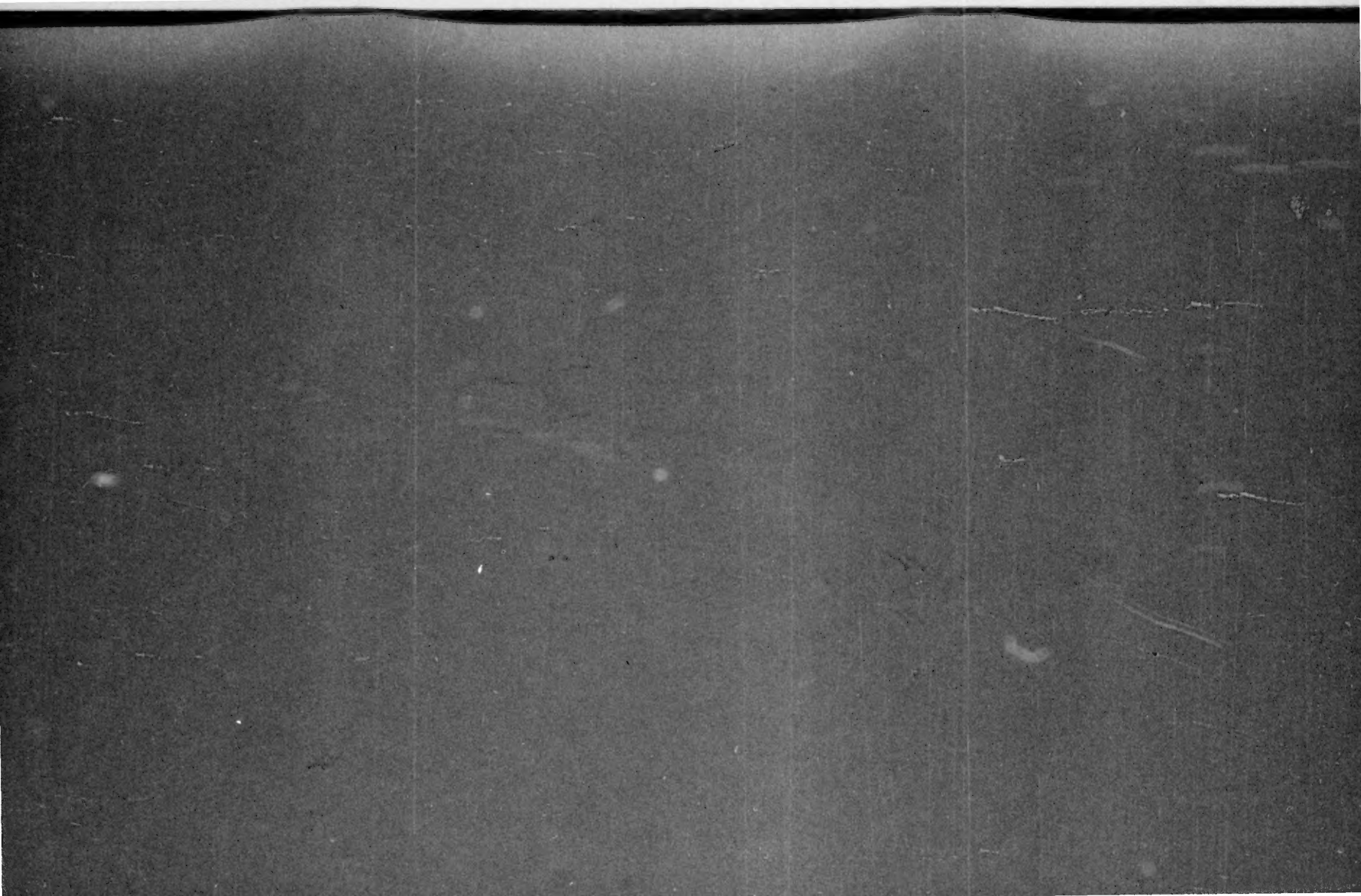

QUESTIONS PRESENTED

1. Has Jane Doe ("Jane") stated a cause of action under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), where she has alleged that Petitioner (a recipient of federal funds) discriminated against her when it had actual knowledge of ongoing, pervasive verbal and physical sexual harassment by her fellow students and, with intentional indifference, failed to take prompt, appropriate, and effective preventative and remedial action?

2. Did Congress abrogate Petitioner's Eleventh Amendment immunity from suit under Title IX pursuant to its powers under the Spending Clause and Section 5 of the Fourteenth Amendment when it enacted the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7 (the "Equalization Act")?

LIST OF PARTIES

This action was filed by John and Janet Doe (Jane's parents) individually, and on behalf of Jane, then a minor. Jane has since reached the age of majority. Jane's parents' individual claims have been dismissed.

Jane, a former student of University High School ("Uni High"), which Petitioner owns and oversees, brought claims against Petitioner and eight administrators of Petitioner and Uni High. Jane's claims against the individual administrators were dismissed based on the district court's ruling that a Title IX action against an educational institution forecloses an action against individual state actors under 42 U.S.C. § 1983 for violation of Title IX and the Equal Protection Clause. (P.A. 84).[1]

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[1] References to Petitioner's Appendix are cited herein as "P.A. ___."

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner correctly notes that this case involves U.S. Const. art. I, § 8, cl. 1, U.S. Const. amend. XI, U.S. Const. amend. XIV, and Title IX. This case also involves the Equalization Act, reprinted in the Appendix hereto at A.1, as well as 34 CFR § 106.8, reprinted in the Appendix hereto at A.2, and the Department of Education Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (1997) ("OCR Guidance"). Contrary to Petitioner's contention, the Petition does not raise the constitutionality of an act of Congress.

STATEMENT OF THE CASE

A. Factual Background

In an effort to conceal the facts Jane alleges which establish intentional discrimination in violation of Title IX, Petitioner ignores the extent of the sexual harassment perpetrated by Jane's peers and mischaracterizes its own "responsive efforts" in the face of seventeen months of unabated sexual harassment.[2]

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[2] Petitioner's comment that it is not "alleged to be responsible for the alleged sexual misconduct of student M. in late 1992 and early 1993 which led to the alleged harassment of Doe by her student peers" demonstrates a fundamental misunderstanding of the nature of Jane's cause of action. Jane does not seek to hold Petitioner liable for the actions of the harassing students, but rather Petitioner's own action and inaction despite its knowledge that such harassment was

In January 1993, a self-declared "posse" of thirteen-year-old Jane's peers began a campaign of sexual harassment against Jane. Among other sexual epithets and ridicule, acts of exhibitionism, and unwelcome sexual advances, members of the posse scribbled on classroom desks "Jane is a slut," "Jane is a whore," "Jane is good in bed." (Compl. ¶ 25, P.A. 153). One boy exposed his genitals and buttocks to Jane and other students during class. (Compl. ¶¶ 29, 59; P.A. 154, 160). Another boy repeatedly stroked Jane's legs and tried to force his hand up her skirt during class. (Compl. ¶ 53; P.A. 159-60).

In February 1993, Jane told the Principal of Uni High about the harassment. He assured Jane the sexual harassment would be remedied. (Compl. ¶ 32; P.A. 155). When the Principal detained Jane's classmates and threatened them with expulsion if the harassment continued, the students openly blamed Jane for the "lecture." (Compl. ¶ 33; P.A. 155).[3] The Uni High Counselor summoned Jane to discuss her complaints of sexual harassment and asked Jane if people ever called her a "know-it-all bitch." The Counselor advised Jane's mother that the sexual harassment was "a Jane problem" and that "it is Jane who has to change." (Compl. ¶¶ 34, 37; P.A. 155-56).

In a letter to Jane's parents, Petitioner's Interim Vice Chancellor admitted knowledge of the sexual harassment, promised that a sexual harassment policy would be implemented and distributed to students at the beginning

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occurring. Unlike Petitioner, the Seventh Circuit understood this important distinction. *See Doe v. University of Ill.*, 138 F.3d 653, 662 (7th Cir. 1998).

[3] This was apparently an empty threat, as no student was ever expelled despite the ongoing harassment.

of the new school year, and acknowledged the need to "create the most supportive atmosphere possible for learning and development." (Compl. ¶¶ 42-43; P.A. 157). At an assembly during the first week of the new school year, Uni High's Assistant Director reported to Jane's classmates "trouble" with legal personnel and that distribution of a new handbook was required. The students groaned and laughed when he read, in a mocking manner, a list of prohibited sexual harassment behavior. (Compl. ¶ 47; P.A. 158).

None of this conduct that Petitioner calls "responsive efforts" stopped or lessened the sexual harassment. Instead, Petitioner's so-called "responsive efforts" caused pervasive retaliation including continued harassment. (Compl. ¶¶ 33, 65, 70, 73-74, 76; P.A. 155, 162-64).

When Jane sought from Uni High's Assistant Director protection against the retaliation, he told Jane to "separate the wheat from the chaff" and start acting like a "normal female," chastised her for skipping class and scolded her for making allegations which could adversely affect the boys' futures. (Compl. ¶¶ 64-66; P.A. 161-62).

Petitioner failed to designate an official responsible for intake and investigation of complaints and failed to inform Jane of such an official until January 1994 – approximately one year after the sexual harassment began. (Compl. ¶ 32; P.A. 155). Jane twice tried to file a sexual harassment complaint with the newly appointed "intake person." Both times, he refused to take her complaint. Instead, he informed Jane that the boys who sexually harassed her had a good reason for not liking her. (Compl. ¶¶ 61, 81, 84; P.A. 161, 164-65).

One year after the harassment began, an investigation was conducted that led to further retaliation by Jane's classmates. They blamed her, called her a bitch, and threatened to kill her. (Compl. ¶¶ 63, 65; P.A. 161, 162). When a student was moved out of one of Jane's classes, the student blamed Jane, called her a "bitch," "slut," and "whore," and told his classmates Jane was the problem. (Compl. ¶ 73; P.A. 163). Despite Jane's parents' plea for help from several officials of Petitioner, no action was taken to curtail the continued harassment. (Compl. ¶¶ 74-75; P.A. 163-64).

Petitioner failed to adopt and publish grievance procedures providing guidelines for prompt and equitable resolution of sexual harassment complaints until May 1994 – when Petitioner had allowed the sexual harassment to persist for approximately seventeen months and grow so vicious and intolerable that Jane was forced to withdraw from school and leave town. (Compl. ¶¶ 40, 48, 97; P.A. 156, 158-59, 168).[4]

Jane contends Petitioner was intentionally indifferent to her complaints, and Petitioner's knowledge of seventeen months of unabated sexual harassment and hostility, and failure to take prompt, appropriate remedial action, constitutes intentional sex discrimination in violation of Title IX. (Compl. ¶¶ 95-96; P.A. 167-68).

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[4] All of these facts must be taken as true, and all reasonable inferences must be drawn in Jane's favor, as this case was decided by the district court on Petitioner's 12(b)(6) motion to dismiss. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

B. Procedural Background

In her Complaint, Jane alleged both intentional discrimination (Count I) and reckless discrimination (Count II) in violation of Title IX. (P.A. 167-70). On January 22, 1996, Magistrate David G. Bernthal filed his Report and Recommendations ("Report") regarding Defendants' motion to dismiss the Complaint. (P.A. 86-133). Magistrate Bernthal found that a student may state a cause of action under Title IX for student-to-student sexual harassment (P.A. 120). However, he recommended dismissal without prejudice of Jane's Count I Title IX claim, advising Jane to replead this claim to allege that Petitioner's "failure to remedy the students' sexual harassment campaign was motivated by an intent on the part of [Petitioner] to discriminate against [Jane] on the basis of her sex." (P.A. 127). He recommended dismissal of Count II with prejudice. (P.A. 128).

On March 29, 1996, Judge Michael M. Mihm denied the parties' objections and adopted the Report in its entirety. (P.A. 80-85). The district court dismissed Count I without prejudice and dismissed Count II with prejudice. (P.A. 83-84). The court granted Jane leave to replead her Count I Title IX claim within 21 days. (P.A. 83). Both Jane and Petitioner moved for reconsideration or certification pursuant to 28 U.S.C. § 1292(b).

On September 25, 1996, the district court entered an order (i) denying both parties' motions to reconsider, (ii) denying Petitioner's motion for certification of whether the Eleventh Amendment bars suit against Petitioner for violation of Title IX; and (iii) granting Jane's motion for 1292(b) certification of the issue of whether Petitioner's

knowledge of and failure to remedy the sexual harassment of Jane gives rise to a cause of action under Title IX. (P.A. 69-79).

On October 3, 1996, Jane timely filed her petition for permission to appeal to the Seventh Circuit the district court's dismissal of her Title IX claims. On October 4, 1996, Petitioner filed its notice of appeal of the district court's rejection of its claim of Eleventh Amendment immunity. On December 5, 1996, the Seventh Circuit granted Jane's petition for permission to appeal, as well as her motion to consolidate the parties' appeals. The United States intervened to address the validity of Congress' abrogation of Eleventh Amendment immunity. The issues were fully briefed, and the Seventh Circuit heard oral argument on September 3, 1997. During the course of the appeal, both parties submitted various additional authority pursuant to F.R.App.P. 28(j).

On March 3, 1998, the Seventh Circuit reversed the district court's dismissal of Jane's Title IX claim and affirmed the district court's rejection of Petitioner's Eleventh Amendment immunity defense. The Seventh Circuit held that "Title IX does make schools liable for failure to respond promptly and appropriately to known student-on-student sexual harassment." 138 F.3d at 667 (P.A. 34).

Contrary to Petitioner's contention, the Seventh Circuit did not hold that a cause of action for monetary damages can be maintained under Title IX against educational institutions

accepting federal funds without requiring proof of discriminatory intent.[5] Rather, the court rejected the district court's requirement that Jane plead and prove that the failure to respond was *as a result of* sexually discriminatory intent, holding that "[t]he failure promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex, and so, once a plaintiff has alleged such failure, *she has alleged the sort of intentional discrimination against which Title IX protects.*" *Id.* at 661 (emphasis added) (P.A. 18).

With respect to the Eleventh Amendment issue, Petitioner did not question in the district court or in the Seventh Circuit whether enactment of Title IX was within Congress' power under Section 5 of the Fourteenth Amendment, but rather whether Congress in fact enacted Title IX pursuant to that power. *Id.* at 658 (P.A. 9). The Seventh Circuit agreed with the Eighth Circuit that Title IX was enacted and extended to the states as a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment. *Id.* at 659-60 (citing *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997)) (P.A. 12-14).[6] The court went

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[5] The five separate opinions in *Doe* do not conflict, to the extent that all of them recognize that Title IX prohibits *intentional* discrimination.

[6] Recognizing that Congress may draw on more than one source of power in enacting a piece of legislation, the Seventh Circuit noted that "it is equally sensible that Congress, in using federal educational funds as the core of Title IX, should use its Spending Clause powers to reach private actors and its Fourteenth Amendment powers to reach the States." *Doe*, 138 F.3d at 659 (P.A. 13).

on to hold that Congress validly abrogated States' Eleventh Amendment immunity from suit when it passed the Equalization Act, "expressly making States subject to suits to enforce Title IX." *Id.* at 660 (P.A. 15).

The Seventh Circuit rejected Jane's contention that Eleventh Amendment immunity is unavailable in suits based solely on federal question jurisdiction, relying on cases dating back to 1890 when this Court first departed from the express language and meaning of the Eleventh Amendment. *Id.* at 656-67 (P.A. 6-7). Also, in light of its conclusion that Congress abrogated the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment when it enacted the Equalization Act, the Seventh Circuit declined to rule whether Petitioner's acceptance of federal funds constitutes a waiver of its Eleventh Amendment immunity from suit under Title IX, as expressly provided in the Equalization Act. *Id.* at 660 (P.A. 15).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Seventh Circuit's Decision in *Doe* Does Not Conflict With This Court's Ruling in *Gebser v. Lago Vista.*

The Seventh Circuit held in *Doe* that a student states a cause of action for intentional discrimination under Title IX where she alleges that an institution receiving federal funds fails to respond promptly and appropriately to student-on-student sexual harassment about

which school officials have actual knowledge. 138 F.3d at 661. This is consistent with and tantamount to this Court's ruling in *Gebser v. Lago Vista Independent School District* that an institution is subject to liability under Title IX when it is shown that an individual with authority to address discrimination and to institute corrective measures has actual knowledge of discrimination and fails to adequately respond. 118 S. Ct. 1989, 1999 (1998).[7]

Contrary to Petitioner's contention, the Seventh Circuit in *Doe* did not arrive at an "easier standard" of liability than that set forth by this Court in *Gebser*. This Court in *Gebser* noted that the institution's response (or lack thereof) to known discrimination must amount to "deliberate indifference," defined by this Court as an official decision by the institution not to remedy the violation. *Id.* at 1999. This is the essence of the Seventh Circuit's holding in *Doe*, and precisely what Jane has alleged: Petitioner's actual knowledge of and *intentional indifference* to her repeated complaints of sexual harassment. (Compl. ¶ 95-96; P.A. 167-68).[8] Whether Petitioner's

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[7] To the extent there is any perceived difference between the Seventh Circuit's decision in *Doe* and this Court's analysis in *Gebser*, it must be noted that *Gebser* was decided in a different factual context from this case, as it involved a sexual relationship between a teacher and a student, as opposed to the student-on-student sexual harassment here. Moreover, unlike Jane Doe in this case, the student in *Gebser* did not contend she could prevail under an actual notice standard. 118 S. Ct. at 1999-2000.

[8] This also comports with Judge Posner's opinion in *Doe*, where he noted that a student establishes deliberate indifference in the face of known student-on-student sexual harassment when the student shows that the institution

failure to respond quickly, appropriately, or effectively to sexual harassment that continued unabated for nearly seventeen months reflects a conscious choice amounting to intentional discrimination is a factual inquiry not properly resolved by this Court or the Seventh Circuit, but rather appropriately left for a jury to decide.

II. There Is No Conflict In the Circuits As to Whether Liability Under Title IX Requires a Showing of Discriminatory Intent.

The Petition is grounded in a mischaracterization of the decision in the court below. According to Petitioner, the Seventh Circuit ruled that Jane may proceed on her Title IX claim without establishing discriminatory intent. The Seventh Circuit made no such ruling. Rather, the Seventh Circuit expressly recognized that proof of discriminatory intent is required for plaintiffs to obtain monetary damages under Title IX. *Doe*, 138 F.3d at 661, 663 (P.A. 18, 22-23).

The Seventh Circuit's decision in *Doe* does not conflict with *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) or *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*), *petition for cert. filed*, 66 USLW 3387 (Nov. 19, 1997), to the extent that all three courts are in general

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deliberately failed to act, or took steps it knew would be ineffectual to protect the student. 138 F.3d at 680 (Posner, C.J., dissenting from denial of reh'g *en banc*) (P.A. 68).

agreement regarding the necessity of pleading and proving discriminatory intent.[9] Contrary to Petitioner's contention, neither the Fifth nor Eleventh Circuit has denied the existence of a cause of action under Title IX for student-on-student sexual harassment. Rather the two circuits identify methods different than the Seventh Circuit identified in *Doe* for proving such a claim.[10]

To the extent *Rowinsky* and *Davis* conflict with *Doe* as to the facts required to plead and prove discriminatory intent, the *Rowinsky* and *Davis* opinions have been discredited by numerous courts, including the court below, as well as the Department of Education's Office for Civil

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[9] It is the nature and extent of the facts that must be alleged and proven to establish such discriminatory intent that divides the circuits. However, such a factual inquiry is not appropriate for review by this Court, but rather should be determined on a case-by-case basis by the finder of fact. In this case, the Seventh Circuit expressly found that the facts alleged by Jane would allow a jury to find that Petitioner failed to respond promptly and appropriately to Jane's complaints. *Doe*, 138 F.3d at 668. The Seventh Circuit took all facts alleged by Jane to be true, as this case came before the Seventh Circuit on interlocutory appeal of a 12(b)(6) dismissal. This provides another reason to deny the Petition, as this Court commonly declines to review interlocutory decisions. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock RR*, 389 U.S. 327, 328 (1967). Nothing here warrants a departure from that practice.

[10] This Court denied a petition for writ of certiorari in *Rowinsky*. The plaintiff's petition for writ of certiorari in *Davis* is pending. The issues framed by the parties in *Davis* include whether principles developed under Title VII (a "knew or should have known" standard) should apply to peer sexual harassment claims under Title IX. In the event this Court grants the *Davis* petition, the issue raised by Petitioner herein will, presumably, be addressed.

Rights – the administrative agency charged with enforcing Title IX. *See, e.g., Doe,* 138 F.3d at 662 ("The Fifth Circuit's rule would leave schools completely free to ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required likewise to ignore any complaints they might receive from their male students.") (P.A. 20-21); *Oona, R.-S.- v. McCaffrey,* 143 F.3d 473, 477 (9th Cir. 1998) ("We have difficulty squaring the reasoning of those cases [*Davis* and *Rowinsky*] with the Supreme Court's in Franklin and our own in Petaluma."), *petition for cert. filed,* 67 USLW 3083 (June 19, 1998); OCR Guidance, 62 Fed. Reg. at 12036, 12048 ("OCR believes that the *Rowinsky* decision misinterprets Title IX.").[11] *See also Franks v. Kentucky Sch. for the Deaf,* 956 F. Supp. 741, 746 (E.D. Ky. 1996), *aff'd,* 142 F.3d 360 (6th Cir. 1998) and *Doe v. Petaluma City Sch. Dist.,* 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (both rejecting *Rowinsky* and adopting reasoning of Panel opinion in *Davis*).

Petitioner also incorrectly states that the Seventh Circuit relied upon the Fourth Circuit's vacated panel opinion in *Brzonkala v. Virginia Polytechnical Institute and State University,* 132 F.3d 949 (1997), *reh'g en banc granted, opinion vacated* (4th Cir. 1998). Other than two passing references to the *Brzonkala* holding, the Seventh Circuit did

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[11] Contrary to Petitioner's assertion, this Court in *Gebser* did not reject OCR's Guidance (only a fraction of which is quoted by Petitioner), but rather rejected the idea that an institution can be held liable for sexual harassment under Title IX without actual knowledge of the harassment. 118 S. Ct. at 1995. That issue does not arise in this case, where actual knowledge is admitted by Petitioner. *See Doe,* 138 F.3d at 668.

not *rely* on it. *Doe*, 138 F.3d at 661, 668 (P.A. 17, 35). Rather, the Seventh Circuit expressly rejected *Brzonkala's* lesser "knew or should have known" standard, the standard advocated by Jane in this case in the district court and on appeal. *Id.* at 667, 668 (P.A. 32, 35-36).[12]

Petitioner also incorrectly states that no other circuit court has addressed the existence of a claim under Title IX for failure to remedy student-on-student sexual harassment. The Ninth Circuit has ruled that Title IX requires school officials to take reasonable steps to remedy sexual harassment by students. *See Oona*, 143 F.3d at 477 (addressing Section 1983 claim based on violation of Title IX). The Tenth Circuit has also recognized a cause of action for peer sexual harassment. *See Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996) (adopting test set forth by Eleventh Circuit panel in *Davis*, but declining to address standard of liability because challenged conduct was not based on sex).[13]

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[12] Much of the Fourth Circuit's panel decision in *Brzonkala* dealt with the Violence Against Women Act. It is unknown whether the opinion was vacated primarily based on the court's ruling in that regard.

[13] That the express language and legislative history of Title IX do not contemplate a cause of action for student-on-student sexual harassment is inapposite. Neither Title IX's language nor its history contemplate a cause of action for teacher-student sexual harassment; yet this Court has expressly found such harassment to be actionable under Title IX. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65 (1992); *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979) (recognizing implied private right of action under Title IX).

The Seventh Circuit understood that Jane does not seek to hold Petitioner liable for its students' conduct, but rather for its own conduct in failing to respond in any meaningful way to Jane's complaints of ongoing, pervasive sexual harassment. *Doe*, 138 F.3d at 662 (P.A. 19-20). Petitioner, like the district court, contends that a plaintiff cannot prove intentional sexual discrimination under Title IX without establishing that the failure to respond promptly and appropriately to remedy sexual harassment was *"by reason of sex."* Yet, as the Seventh Circuit recognized, the failure to take prompt, appropriate remedial action despite knowledge of sexual harassment is, itself, intentional discrimination on the basis of sex. *Id.* at 663 (P.A. 18).[14]

Contrary to Petitioner's contention, the Seventh Circuit did not overlook the contractual nature of Title IX as Spending Clause legislation, and the notice to which states are entitled regarding potential liability for violations. Rather, the Seventh Circuit expressly acknowledged that Title IX was enacted, in part, pursuant to Congress' spending power. *Id.* at 662 (P.A. 21). The court then emphasized this Court's ruling in *Franklin*, quoted only in part by Petitioner, that "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *This notice problem does not arise in a case such as this, in which intentional*

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[14] Petitioner's citation of *St. Mary Honor Center v. Hicks*, 509 U.S. 502 (1993) is unavailing, as *Hicks* was not a sexual harassment case, but rather involved a claim of disparate treatment.

discrimination is alleged." 503 U.S. at 74-75. *See Doe*, 138 F.3d at 663 (P.A. 22).

Petitioner also mischaracterizes and misconstrues the Seventh Circuit's reliance on Title VII to reach its decision. Contrary to Petitioner's implication, the Seventh Circuit did not hold that Title VII principles should be imported wholesale into the Title IX arena. Rather, the court noted differences in the language and history of Title IX and Title VII and expressly rejected the use of Title VII agency principles (and the lesser "knew or should have known" standard commonly associated with a negligence theory), given that Jane does not base her Title IX claim on a theory of vicarious liability. The Seventh Circuit did not adopt Title VII standards, but noted that Title VII jurisprudence supports a cause of action under Title IX for direct liability for failure to respond appropriately to sexual harassment about which educational institutions have actual knowledge. *Doe*, 138 F.3d at 666-67 (P.A. 30, 32).

III. There Is No Conflict In the Circuits (or Between the Seventh Circuit's Decision in *Doe* and Any Decision of This Court) Concerning Whether Congress Has Abrogated the States' Eleventh Amendment Immunity From Suit Under Title IX Pursuant To a Valid Exercise of Constitutional Power.

In 1986, Congress made clear that it had enacted the Equalization Act, in part, pursuant to its powers under Section 5 of the Fourteenth Amendment: "to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth

amendment, S. 1579 makes Congress' intention 'unmistakably clear in the language of the statute' to subject States to the jurisdiction of Federal courts. 105 S. Ct. at 3147. See *Fitzpatrick versus Bitzer*, 427 U.S. 445 (1976)." 132 Cong. Rec. 28624 (quoting Rep. of U.S. Dept. of Justice, Office of Leg. and Intergov'tal Affairs, Washington, D.C., July 13, 1986).

Since Congress' enactment of the Equalization Act in 1986, circuit courts to address the issue have *uniformly* recognized that states do not enjoy Eleventh Amendment immunity in suits under Title IX and Title VI – the model for Title IX. *See, e.g., Doe*, 138 F.3d at 660 (7th Cir.) (Title IX) (P.A. 15); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (Title IX); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (Title IX); *Dekalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 688, n.16, *reh'g denied*, 120 F.3d 276 (11th Cir.), *cert. denied*, 118 S. Ct. 601 (1997) (Title VI); *Egerdahl v. Hibbing Community College*, 72 F.3d 615 (8th Cir. 1995) (Title VI and Title IX); *Seater v. California State Univ.*, 48 F.3d 1228 (9th Cir. 1995) (Title VI); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498 (2d Cir. 1990) (Title VI).

In 1992, this Court likewise recognized that Congress abrogated the states' Eleventh Amendment immunity when it enacted the Equalization Act. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992). Two years ago, this Court again emphasized that Congress had "craft[ed] an *unambiguous waiver of the States' Eleventh Amendment immunity*" when it enacted the Equalization Act. *Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996) (emphasis added).

Petitioner's argument that Congress could not have drawn on its Section 5 powers simply because it did not explicitly state that it drew on such powers is simply unsupported by this Court's prior decisions. This Court has long held that Congress need not have used the words "Section 5," "Fourteenth Amendment," or "equal protection" to have exercised its powers under Section 5 of the Fourteenth Amendment. *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983).

Petitioner's reliance on *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) is inapposite. *Pennhurst* does not stand for the proposition that Congress must specify that it has acted pursuant to its power under Section 5 of the Fourteenth Amendment in order for it to have done so. *Doe*, 138 F.3d at 658. And neither *Pennhurst* nor *Gregory v. Ashcroft*, 501 U.S. 452 (1991) involved an issue of sovereign immunity. *Id.* Petitioner's reliance on the dissenting opinion in *Timmer v. Michigan Department of Commerce*, 104 F.3d 833 (6th Cir. 1997) is curious, since the majority in *Timmer* rejected arguments much like those advanced by Petitioner here. In any case, Petitioner fails to identify a conflict or any other reason that would justify granting certiorari on this settled issue.

In any event, Petitioner's acceptance of federal funds constitutes a waiver of its Eleventh Amendment immunity, pursuant to the Equalization Act. When Congress enacted the Equalization Act in 1986, it expressly conditioned Petitioner's receipt of federal funds on its consent to federal jurisdiction: "To the extent that the proposed amendment is grounded on congressional spending powers, S. 1579 *makes it clear to states that their receipt of Federal funds constitutes a waiver of their eleventh amendment*

immunity." 132 Cong. Rec. 28624 (quoting Rep. of U.S. Dept. of Justice, Office of Leg. and Intergov'tal Affairs, Washington, D.C., July 13, 1986) (emphasis added). *See also Clark v. California*, 123 F.3d 1267, 1271 (9th Cir.), *cert. denied*, 118 S. Ct. 2340 (1998).

The Eleventh Amendment does not bar suit against a state when the state has waived its immunity and consents to suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, *reh'g denied*, 473 U.S. 926 (1985). As alleged in the Complaint, Petitioner receives federal funds. (Compl. ¶ 5; P.A. 150). Therefore it has consented to suit in federal court for its violation of Title IX.

The Seventh Circuit declined to rule whether Petitioner's acceptance of federal funds constitutes a waiver of Eleventh Amendment immunity under Title IX, as expressly provided in the Equalization Act. The court found it was unnecessary to resolve this issue, given its conclusion that Congress abrogated the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid exercise of power. 138 F.3d at 660 (P.A. 15). This is another settled issue that supports the decision below, thus warranting denial of the Petition.

IV. Petitioner Failed To Preserve In the Courts Below the Issue of Whether Congress Exceeded Its Power Under Section 5 of the Fourteenth Amendment When It Enacted Title IX and Extended It To the States.

This Court has long held that, absent exceptional circumstances, questions not pressed or passed upon below are not reviewed by this Court. *Duignan v. United*

States, 274 U.S. 195, 200 (1927). No exceptional circumstances exist here.

An issue is not pressed or passed on below absent a "real contest" concerning an issue at earlier stages of the case. *Illinois v. Gates*, 462 U.S. 213, *reh'g denied*, 463 U.S. 1237 (1983). Petitioner did not question in the district court or in the Seventh Circuit whether enactment of Title IX was within Congress' power under Section 5 of the Fourteenth Amendment.[15] Rather, the issue framed by Petitioner, addressed by Jane, and ruled upon by the court below, was whether Congress in fact enacted Title IX pursuant to that power. 138 F.3d at 658. Petitioner alluded to the issue of whether Congress exceeded its Section 5 authority for the first time in its petition for rehearing. The record is devoid of any "real contest" on that issue. Accordingly, to the extent that is the true issue for which Petitioner seeks certiorari, the Petitioner should be denied.[16]

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[15] Petitioner apparently recognizes this, as it does not directly raise in its Petition whether Title IX was an unconstitutional exercise of Congress' Section 5 power.

[16] Petitioner was aware of this Court's decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) well before the Seventh Circuit rendered its decision in this case. In fact, whether Congress is empowered under Section 5 of the Fourteenth Amendment to enact legislation that prohibits some conduct that is not unconstitutional was raised by Petitioner in another case. *See Goshtasby v. Board of Trustees of Univ. of Ill.*, 141 F.3d 761, 769-72 (7th Cir. 1998) (argued Dec. 8, 1997) (rejecting Petitioner's argument that Congress exceeded its Section 5 enforcement power in enacting the ADEA). Yet Petitioner opted not to raise it in this case.

In any event, this Court has ruled that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . [T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) (citations omitted). The legislative history of Title IX clearly evinces Congress' intent to enforce the Equal Protection Clause of the Fourteenth Amendment. *Doe*, 138 F.3d at 658 n.5 (P.A. 9-10). This Court should not grant the Petition so that Petitioner may, for the first time, attack the constitutionality of Title IX.

V. Petitioner's Misconstruction and Misapplication of this Court's Holding In *City of Boerne v. Flores* Is a Novel and Insupportable Argument Adopted By No Other Court.

Petitioner contends the Seventh Circuit's recognition of a cause of action that does not require proof of discriminatory intent exceeds the substantive guarantees of the Fourteenth Amendment and conflicts with its holding that Congress abrogated the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment. Petitioner cites no legal authority to support its argument. Petitioner identifies no conflict in the circuits or between the Seventh Circuit and this Court. In any case, Petitioner's argument is unfounded in several respects.

First, as discussed in Part I herein, the Seventh Circuit expressly recognized that a Title IX plaintiff must prove discriminatory intent. Accordingly, Petitioner's repeated attempt to mischaracterize the Seventh Circuit's decision in order to conjure an issue worthy of certiorari should be disregarded.

Further, in *City of Boerne*, this Court addressed whether a statute was constitutional in light of the limits on *Congress'* power to enact legislation under Section 5 of the Fourteenth Amendment. As stated in Part IV *supra*, Petitioner does *not* contend that *Congress* exceeded its Section 5 powers when it enacted Title IX or the Equalization Act. Rather, Petitioner attempts to compare the *lower court's interpretation* of Title IX to the limits on *Congress' power to enact* Title IX. These are two separate legal questions; one addressing the scope of Congress' authority to pass a law, the other addressing the manner in which a court applies the law. This mixing of apples and oranges is insupportable.[17]

Petitioner's discussion of *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) is mere surplusage, as *Nabozny* was not a Title IX case, but rather one brought pursuant to Section 1983 alleging the *denial* of equal protection – a violation of Section 1 of the Fourteenth Amendment.[18] To the extent

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[17] Importantly, the issue raised by Petitioner arises in the context of assessing immunity under the Eleventh Amendment. This Court's decision in *City of Boerne* did not involve a question of Eleventh Amendment immunity.

[18] Petitioner's citation of *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) is, likewise, surplusage, as *Deshaney* was decided solely on due process

this case addresses the question at all, it concerns congressional power to enact legislation under Section 5 of the Fourteenth Amendment, not the judiciary's interpretation of the substantive reach of the Fourteenth Amendment. This distinction was made apparent long ago in *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1965) and is equally clear today. In *Katzenbach*, this Court set forth a three-part test to determine whether Congress properly enacted legislation under Section 5 of the Fourteenth Amendment. This test has been adopted by countless other courts, and Petitioner identifies no conflict in the circuits as to the application of the *Katzenbach* test. Rather, Petitioner wholly disregards the test, each element of which is satisfied in the context of Title IX.

Finally, this Court has recognized that legislation designed to deter or remedy unconstitutional conduct is appropriate under Congress' Fourteenth Amendment enforcement power even if it prohibits conduct which is not, itself, unconstitutional. *City of Boerne*, 117 S. Ct. at 2163. Accordingly, even conduct that does not evince discriminatory intent (and therefore would not violate the Constitution's guarantee of equal protection) can fall within the prohibition of legislation that is designed to deter or remedy equal protection violations. *See Varner v.*

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grounds. Jane has not asserted a due process claim and does not base her Title IX claims on the "special relationship" asserted in *Deshaney* and its progeny, but rather Petitioner's intentional failure to remedy a hostile environment caused by pervasive sexual harassment. Importantly, *Deshaney* did not hold that students may sexually harass other students or that educational institutions are immune from liability for failing to appropriately address and remedy sexual harassment.

Illinois State Univ., No. 97-3253, 1998 WL 407011 (7th Cir., July 21, 1998); *Clark*, 123 F.3d at 1270.[19] Simply stated, it is irrelevant that the cause of action that the Seventh Circuit held was actionable under Title IX would not be actionable under the Equal Protection Clause of the Fourteenth Amendment. Petitioner cites to no legal authority to establish otherwise.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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[19] In *Varner*, the Seventh Circuit recently rejected the argument that the Equal Pay Act exceeds the scope of Congress' power to enforce the Fourteenth Amendment. The court held the Equal Pay Act to be a constitutional exercise of Congress' Section 5 power, even though, by not requiring proof of discriminatory intent, the Act proscribes some constitutional state action. 1998 WL 407011 at *10. Similarly, in *Clark*, the Ninth Circuit ruled that the ADA and Rehabilitation Act are proper exercises of Congress' Section 5 enforcement power, noting that "Congress's powers under the Fourteenth Amendment extend beyond conduct which is unconstitutional, and Congress may create broader equal protection rights than the Constitution itself mandates."

42 U.S.C. § 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Educational Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date

The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

CODE OF FEDERAL REGULATIONS
TITLE 34 – EDUCATION
SUBTITLE B – REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION
CHAPTER I – OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION
PART 106 – NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE
SUBPART A – INTRODUCTION

§ 106.8 Designation of responsible employee and adoption of greivance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.